



NOTICE OF PROPOSED RULEMAKING

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By the Commission:

I. INTRODUCTION

1. By this *Notice of Proposed Rulemaking*, the Commission proposes rules to implement new section 4(g)(3) of the Communications Act, 47 U.S.C. § 154(g)(3), which authorizes the Commission to accept unconditional gifts, donations and bequests. Specifically, section 4(g)(3) authorizes the Commission, in furtherance of its functions, "to accept, hold, administer, and use unconditional gifts, donations, and bequests of real, personal, and other prop-

erty (including voluntary and uncompensated services, as authorized by section 3109 of Title 5, United States Code). See 47 U.S.C. § 154(g)(3)(A). Under the new section, the Commission is required to promulgate regulations implementing its authority that "include provisions to preclude the acceptance of any gift, bequest or donation that would create a conflict of interest or the appearance of a conflict of interest." See 47 U.S.C. § 154(g)(3)(D).

2. The chief purpose of this *NPRM* is to propose regulations that would implement the conflict of interest restriction described above. In order to develop implementing regulations, the Commission has looked for guidance to the policies of other agencies that have statutory gift acceptance authority. Those policies are discussed in section II, below. The Commission has also looked for guidance in the provisions of the new government-wide standards of employee conduct, as well as General Services Administration regulations implementing agency acceptance of travel reimbursement, which are discussed in section III. Finally, in section IV, alternative proposals are set out for comment. Members of the public are requested to comment on the proposals set forth herein and are also encouraged to submit alternative proposals. Comment is also sought on Commission policies and procedures for reporting any gifts, donations or bequests under this new statutory authority.

II. POLICIES OF OTHER AGENCIES WITH STATUTORY GIFT ACCEPTANCE AUTHORITY

3. Congress has enacted statutes that afford a number of other Federal departments and agencies the requisite statutory authority to accept gifts, donations and bequests.¹ Apart from new section 4(g)(3), however, it appears that no other agency's gift acceptance statute contains conflict of interest limitations.² Nevertheless, several of the Federal entities with such authority have themselves imposed conflict of interest restrictions on, or developed general policies relating to, their gift and bequest authority.³ In order to develop proposed regulations, we have summarized and discussed below two of these Departments' policies.

¹ The following other government entities have statutory gift acceptance authority: 1) Administrative Conference of the United States, 5 U.S.C. § 575(c)(12); 2) Board of International Broadcasting, 22 U.S.C. § 2876; 3) Department of Agriculture, 7 U.S.C. § 2269; 4) Central Intelligence Agency, 50 U.S.C. § 4031; 5) Department of Defense, 10 U.S.C. § 2601; 6) Department of Commerce, 15 U.S.C. § 1522; 7) Department of Education, 20 U.S.C. § 3481; 8) Department of Energy, 42 U.S.C. § 7262; 9) Department of Health and Human Services, 42 U.S.C. § 300aaa; 10) Department of Transportation, 49 U.S.C. § 1657(m); 11) Department of the Treasury, 31 U.S.C. § 321(d); 12) Food and Drug Administration, 21 U.S.C. § 871(c); 13) General Services Administration, 40 U.S.C. § 298a; 14) Institute of Museum Services (NEA/NEH), 20 U.S.C. § 966; 15) International Cultural and Trade Center Commission; 40 U.S.C. § 1106(f)(4); 16) Legal Services Corporation, 42 U.S.C. § 2996e(a)(2); 17) Library of Congress, 2 U.S.C. § 157; Lowell Historic Preservation Commission, 16 U.S.C. § 410cc-34; 18) National Science Foundation, 42 U.S.C. § 1870(f); 19) National Commission on Libraries and Information Science, 20 U.S.C. § 1503; 20) National Transportation Safety Board, 49 U.S.C. Appendix § 1903(b)(6)(F); 21) Pension Benefit Guaranty Corporation, 29 U.S.C. § 1302(b)(5); 22) Roosevelt Campobello International Park Commission, 16 U.S.C. § 1103; and 23) Securities Investor Protection Corporation, 15 U.S.C. § 78ccc(b)(6). Absent express statutory authority,

agencies are prohibited from accepting gifts of money or property for the agency's use. See 16 Comp. Gen. 911, 912 (1937). The acceptance of a gift without the prerequisite statutory authority constitutes an impermissible augmentation of an agency's appropriated funds and, in such circumstances, the agency must remit the donation to the U.S. Treasury as a miscellaneous receipt. In contrast, gifts or other donations accepted pursuant to specific statutory authority are accounted for as trust funds and are deposited in the Treasury as trust proceeds under 31 U.S.C. § 1321(b), to be disbursed to the agency in accordance with the terms of the trust.

² At the same time Congress enacted section 4(g)(3), Congress did, however, enact a provision that prohibits the Commerce Department from soliciting gifts for the National Telecommunications and Information Administration (NTIA), where such solicitation would create a conflict of interest or appearance thereof. See Telecommunications Authorizations Act of 1992, P.L. 102-538, section 105(e). That conflict of interest provision, however, applies only to circumstances in which gifts are solicited.

³ In addition, the Department of Transportation, although it has no written policy governing conflicts of interest, does have an established policy not to accept offers of gifts and bequests where it has not been established that such acceptance would serve some recognized need or objective of the Department at a

4. *Department of Treasury Directive.* To implement its gift acceptance authority, the Department of the Treasury has issued a directive that requires any employee approached regarding the possibility of a gift to refer the matter to the Assistant Secretary of the Treasury (Management) or his designee to review the gift offer. That official must determine, first, if a gift's acceptance will aid and facilitate the work of the Department and second, whether acceptance will create a conflict of interest.⁴

5. In making a conflict of interest determination, the Assistant Secretary is required to consider whether the donor has, or is seeking to obtain, contractual or other business or financial relations with the Treasury Department or "conducts operations or activities that are regulated by the Treasury Department."⁵ If these elements are present, the Assistant Secretary must reject the gift "if the offer is, or appears to be, an attempt to influence official actions."⁶ The Treasury Department's policy thus focuses primarily on the donor's motivation and, specifically, on whether the gift is designed to influence an official's action.

6. *Department of Health and Human Services.* The Department of Health and Human Services (HHS) recently issued a memorandum addressing conflicts of interest and the appearance of conflicts when using agency gift acceptance authority.⁷ HHS ultimately applies a balancing test which involves a three-step analysis.⁸ Most relevant to implementation of this Commission's gift authority is the second part of the HHS process, in which HHS examines the degree to which there is or appears to be a conflict of interest. HHS formulates the conflict of interest finding as a test to determine "whether the gift's acceptance would reflect unfavorably on the ability of the agency or any employee to carry out its responsibilities or official duties in a fair and objective manner, or would compromise the integrity of or the appearance of the integrity of a governmental program or of any official involved in that program."

7. To determine whether these conflicts of interest concerns exist, the HHS memorandum suggests consideration of a number of factors. First, HHS considers whether the donor is a prohibited or non-prohibited source as defined in standards of employee conduct. Generally, the new agency-wide standards of employee conduct (which were finalized subsequent to the HHS memorandum) define a prohibited source as an entity which does business or seeks to do business with the agency, is seeking official action by the agency, conducts activities that are regulated by the agency, or which has interests that may be affected by the

performance or non-performance of the employee's official duties. See 5 C.F.R. § 2635.203(d).⁹ HHS notes that, when the donor is a prohibited source, there is an increased probability that an actual or apparent conflict of interest may exist and that such gifts require a higher degree of scrutiny.

8. If the donor is a prohibited source, HHS considers the nature and sensitivity of any matter pending before the agency that would affect the interests of the donor. Further, if some of the benefit of the gift will actually be enjoyed by an individual employee, HHS considers the significance of the employee's role in any such pending matter. HHS also takes into account generally whether the agency, rather than an individual employee, is actually receiving the majority of the gift's benefits.

9. Moreover, HHS looks at the effect of accepting the gift on entities which are outside the agency; *i.e.*, whether, and to what extent, any identifiable class of persons or entities would benefit from or be disadvantaged by the acceptance of the gift by the agency or component. HHS, in addition, ascertains whether the size or the nature of the gift alone raises a significant appearance concern. Finally, HHS, much like the Treasury Department, seeks to determine why the gift is being offered to the agency or operating component. HHS suggests consideration here of whether specifically known or ascertainable reasons for the gift may raise or diminish appearance concerns.¹⁰

10. The HHS Memorandum also addresses the solicitation of gifts. HHS opines that in order to solicit gifts from an outside source, an agency must have statutory authority. HHS notes that, where such authority exists, solicitation of gifts, particularly from prohibited sources, raises even greater ethical concerns than the mere acceptance of gifts. Indeed, the HHS policy is not to solicit gifts from prohibited sources at all.

III. IMPACT OF NEW GOVERNMENT-WIDE STANDARDS OF CONDUCT AND TRAVEL REGULATIONS

A. Standards of Employee Conduct

11. In formulating proposed rules, we have also examined the new Government-wide standards of employee conduct, which took effect on February 3, 1993. These standards, promulgated by the Office of Government Eth-

savings in cost or other benefit to the work of the Department. When an offer is received, a written report must be prepared containing the following information: 1) offeror's name/address/description of offeror's business or profession; 2) a description of gift/ bequest; 3) amount of money/estimated value of property; 4) conditions/terms of offer (this would not apply to us since section 4(g)(3) requires gifts, bequests and donations to be unconditional); 5) function/operation where gift is proposed to be used; 6) how gift will be used and benefits; 7) estimate/description of costs to be incurred in putting gift in use; and 8) recommendation on whether offer should be accepted/rejected. See Department of Transportation Order 2700.11, issued April 10, 1973, concerning "Gifts and Bequests" at 1-2. See also para. 38, *infra*, regarding agencies that are subject to reporting requirements for gifts and bequests.

⁴ Department of the Treasury Directive 61-09, entitled, "Implementation of the Department's Statutory Authority to Accept Gifts," issued April 8, 1987.

⁵ *Id.* at 1.

⁶ *Id.* at 2.

⁷ Department of Health and Human Services Memorandum entitled, "Ethical Considerations Regarding the Use of Agency Gift Authority," dated April 29, 1992.

⁸ *Id.* at 4 (references omitted.)

⁹ The new government-wide standards of employee conduct also includes in the definition of prohibited source any organization in which a majority of the members are prohibited sources as defined above, *e.g.*, a trade association composed of regulated entities.

¹⁰ *Id.* at 5-6. As the last step in the analysis, HHS weighs the agency's interest in accepting the gift against any actual or apparent conflicts of interest. *Id.* If the agency's interest in accepting the gift clearly outweighs any actual conflicts or potential appearance problems, the agency may accept the gift. Generally, however, if the agency's interest in accepting the gift does not clearly outweigh the conflicts concerns, the gift should not be accepted. *Id.* at 4-5.

ics (OGE), set forth the basic principles that apply to the acceptance of personal gifts by Federal employees (including any gifts that may be offered because of an employee's official position). See 57 Fed. Reg. 35019. The new government-wide rules expressly do not govern matters that are authorized by agency gift acceptance statutes or regulations promulgated thereunder. See 5 C.F.R. § 2635.105(c)(3). Accordingly, the OGE rules governing gifts to individual employees do not apply to any gifts to the Commission that are accepted under section 4(g)(3) authority. Nevertheless, in formulating conflict of interest standards, we have reviewed the standards and principles in the new rules.

12. The new government-wide standards address conflicts of interest by flatly prohibiting the acceptance of any gift in return for being influenced in the performance of an official act and bar employees from soliciting or coercing the offering of a gift.¹¹ In addition, the rules address conflicts of interest and "appearances" of such conflicts by generally prohibiting employees from soliciting or accepting gifts from a "prohibited" source.¹² As noted above, *supra* para. 11, prohibited sources generally include regulated entities and those who have interests that are affected by agency action. The rules, however, do contain exceptions and permit the acceptance of gifts from prohibited sources where, for example, the value of the gift is considered *de minimis* (less than \$50 per year), and, in specified circumstances, where the agency itself has an interest in the employee's acceptance of the gift and that interest outweighs concern that the gift may or may appear to improperly influence the employee in the performance of his official duties. See 5 C.F.R. § 76.35.204(9)(3).

B. GSA Travel Reimbursement Regulations

13. The General Services Administration (GSA) recently issued new regulations to implement 31 U.S.C. § 1353, legislation enacted in 1989, which permits government agencies to accept payment from non-Federal sources for official travel and other expenses associated with employees' attendance at meetings. Prior to section 1353's enactment, many government agencies accepted such travel and subsistence payments pursuant to their gift acceptance statutes.¹³ Section 1353, however, supersedes an agency's general gift acceptance statute, and thus, the new GSA regulations, which contain explicit conflict of interest provisions, are the governing Federal standard for agencies' acceptance of travel reimbursement. See 57 Fed. Reg. 53284.¹⁴ Because GSA conflict of interest regulations appear to be the principal government standards applicable to an agency's, rather than an individual employee's, acceptance of benefits,

the new GSA conflict of interest standards are especially relevant to any conflict of interest standards we may develop.

14. In this regard, the GSA regulations, much like the agency standards surveyed above, do not impose a blanket ban on travel payments from prohibited sources. Rather, the rules require authorized agency officials to undertake a case-by-case analysis and specify a number of relevant considerations, which, together with other relevant considerations, should guide the agency's determination. These factors include the identity of the non-Federal source, the nature and sensitivity of any matter pending at the agency affecting the interests of the non-Federal source, the significance of the employee's role in any such matter, the monetary value and character of the travel benefits offered by the non-Federal source, the purpose of the meeting and the identity of other expected participants. 41 C.F.R. § 304-1.5(a).

15. In explaining its new rules, GSA also provides several examples of the rules' applications and generally notes that the acceptance of payment should not be precluded solely on the basis that "the non-Federal source seeks official action on some matters from someone at the agency." 57 Fed. Reg. 53286. Consistent with the factors outlined in its rules, the GSA examples thus focus, not on the agency's responsibilities vis-a-vis the donor, but on the nature of responsibilities assigned to the particular employee receiving the travel benefit. Further, even where the employee has responsibilities that affect the entity providing the travel benefit, the examples indicate that conflict of interest concerns are lessened when the travel payment is from an association of prohibited sources, rather than a single entity, or where the employee's responsibilities concern rulemaking rather than adjudicatory matters affecting the donor.

16. According to GSA, the overall objective of such analysis is to determine whether the circumstances "make it appear that it is the donor's intent to influence the employee or agency in future actions or to reward the employee for past actions," or otherwise give rise to an appearance that the offer will improperly influence an employee in the performance of official duties. *Id.* In furtherance of this objective, the GSA regulations also provide that an agency, through its employee, shall not under any circumstances solicit payment from a non-Federal source. See 57 Fed. Reg. 53285; 41 C.F.R. § 304-1.2(b).

¹¹ 5 C.F.R. § 2635.201(c)(1)(2).

¹² 5 C.F.R. § 2635.202. The rules also generally prohibit gifts given because of an employee's official position, even if the donor is not a prohibited source. The latter restriction, however, addresses, not conflicts of interest, but a concern that employees not use public office for private gain.

¹³ We have reviewed the gift fund reports or partial reports from the following Governmental entities: 1) Department of Education; 2) Department of the Treasury; 3) Department of Transportation; 4) National Science Foundation; 5) National Archives; and 6) Department of Commerce. Our review of this material indicates that the vast majority of gifts accepted by the Departments of Commerce, Education and Treasury, NSF and Archives fall into the travel reimbursement and entertainment fund categories. Unlike the Commission, which has separate

authority to accept travel reimbursement under section 4(g)(2), most departments and agencies had no separate statutory authority to accept reimbursement from outside private sources for travel and subsistence until the recent passage of the government-wide travel reimbursement program, 31 U.S.C. § 1353. Prior to § 1353, agencies thus had to rely on their gift and bequest funds to support such activities.

¹⁴ We note that the Commission's acceptance of travel reimbursement for attendance at meetings is governed by explicit provisions of section 4(g)(2) of the Communications Act rather than section 1353. Nevertheless, as discussed above, section 1353's conflict of interest standards are pertinent to the manner in which the Commission implements its new gift acceptance authority.

IV. PROPOSED REGULATIONS

A. Purpose of Regulations

17. As set forth above, section 4(g)(3) requires the Commission to enact regulations that preclude the acceptance of gifts that "would create a conflict of interest or the appearance of a conflict of interest." From the preceding review of other agency policies, it appears that a variety of mechanisms and factors could be considered in implementing such requirements. Before proposing specific regulations, however, it is useful to set forth at the outset the purpose and function of conflict of interest regulations.

18. As reflected in the new OGE regulations governing employee conduct, the general purpose underlying "conflict of interest" requirements is to ensure that government employees "act impartially and do not give preferential treatment to any private organization or individual." 5 C.F.R. § 2635.101(b)(8). Similarly, the HHS conflict of interest provisions discussed above are designed to address a concern that acceptance of a gift would reflect unfavorably on the ability of an agency or any employee to carry out its responsibilities "in a fair and objective manner."

19. By comparison, where Federal employees have a personal financial interest in the outcome of a regulatory matter that is under the employee's official responsibility, or where employees have been promised a personal benefit or gift in exchange for performance or non-performance of regulatory duties, it is generally understood that a "conflict of interest" arises, or may arise, between an employee's interest in impartial performance of official duties and the employee's personal financial interests. To ensure, therefore, that employees maintain impartiality in performance of official duties, numerous Federal statutes and regulations govern employee participation in matters in which the employees have personal financial interests.¹⁵ More fundamentally, employees are statutorily barred from accepting personal gifts in return for being influenced in the performance of any official act.¹⁶ Many of these statutes impose heavy criminal penalties for non-compliance.

20. Beyond guarding against actual conflicts of interest, other requirements, such as the new OGE regulations governing employee conduct and individuals' acceptance of gifts, discussed above, seek to preserve public confidence in the integrity of government actions by avoiding even the appearance that Federal employees, irrespective of their actual impartiality, may have been influenced by personal gifts to take actions that favor particular persons or organizations. See 5 C.F.R. § 2635.101(b)(14) (employees shall avoid actions that create an appearance that the law has been violated). These regulations generally provide that such "appearances" questions should be analyzed from the perspective of a reasonable person with knowledge of the relevant facts. *Id.* With these purposes in mind, therefore, we shall proceed to examine proposed regulations in a context in which gifts are offered to and received, not by individual employees, a matter governed by the OGE rules,

but by the Commission itself under section 4(g)(3). As we discuss below, we think this distinction is critical to our successful implementation of section 4(g)(3).

B. Proposals

21. From the foregoing, it is evident that section 4(g)(3) itself contains a "built in" restriction that is intended to preclude perhaps the most fundamental concern addressed in other conflict of interest statutes; namely, a concern that employees may accept gifts in return for performance or non-performance of official duties. In this regard, section 4(g)(3), unlike some agency gift acceptance statutes, expressly limits the Commission's gift acceptance authority to gifts that are "unconditional." This statutory restriction effectively precludes gifts that are made contingent on official action. To guard against any potential that official action could be influenced by gifts, it is therefore critical to ensure that the section 4(g)(3) prohibition on conditional gifts is carefully and scrupulously observed. As discussed more fully below, we intend to adopt appropriate regulations to carry out this requirement.

22. We recognize, in addition, that even where gifts are offered "unconditionally," issues nevertheless could arise concerning whether such gifts, even though not for the personal benefit of employees, could give rise to an appearance that employees nevertheless would be inclined to accord the donors preferential treatment. As discussed above, several other Federal agencies have recognized that such concerns may arise and have adopted policies intended to address these matters.

23. One means of avoiding any possible conflicts of interest or "appearance" concerns would be to preclude altogether gifts that are made by Commission regulatees and persons who have an interest in the outcome of Commission decisions. Indeed, the Commission has received a letter from four members of the Senate Committee on Commerce, Science and Transportation, expressing their view that the Commission should implement section 4(g)(3) by prohibiting gifts from such entities.¹⁷ We therefore seek comment on this approach.

24. We note, however, that adopting such restrictive regulations would greatly reduce the usefulness of the Commission's gift acceptance authority. The Commission's jurisdiction is expansive and affects the activities and financial interests of a great many commercial and other entities. Thus, under this approach, a vast number of potential donors would be precluded from providing gifts. Moreover, regulated entities may be the most likely donors of equipment or other services that would be useful to the Commission in achieving more efficient performance of its regulatory functions. We note, for example, that regulated entities may benefit considerably from such efficiencies and therefore have the most incentive to offer gifts such as equipment. Furthermore, in some instances that involve the development of new technologies, the regulated entity is the only source for prototype equipment that should be tested prior to the development of technical standards or

¹⁵ See, e.g., 47 U.S.C. § 154(b) (prohibiting certain financial interests by Commission employees); 18 U.S.C. § 208 (prohibiting government employees from participating in matters in which employees have financial interests); 18 U.S.C. § 209 (prohibiting supplementation of salary as compensation for official services).

¹⁶ See 18 U.S.C. § 201(c)(1)(B) (prohibiting employees from

demanding or accepting anything of value in return for performance of official acts); 5 U.S.C. § 7353(b)(1)(B) (prohibiting employees from accepting gifts in return for being influenced in the performance of any official act).

¹⁷ See Letter of October 9, 1992 to then Chairman Sikes from Senators Danforth, Stevens, Inouye and Gorton, United States Senate Committee on Commerce, Science and Transportation.

other applicable regulations. Restrictive gift acceptance regulations could seriously inhibit the introduction of new technologies into the marketplace in a timely manner. Because agency gift acceptance statutes are generally intended as revenue enhancing measures, we are therefore reluctant to construe section 4(g)(3) in a manner that largely defeats that statutory objective.¹⁸

25. By comparison, we note that the General Services Administration in implementing section 1353, authorizing gifts of travel reimbursement, refused to impose a flat ban on travel payments made by prohibited sources. GSA concluded that such an approach would be an "unreasonable regulatory limitation" in view of section 1353's clear intent to permit agencies with tight travel budgets to benefit from travel payments donated from outside sources. In this regard, GSA pointed out that the groups most likely to pay travel expenses in order to hear a government speaker would be those whose activities are affected by the agency's programs. 57 Fed. Reg. 53286.

26. In light of the foregoing considerations, we also seek comment on alternative approaches that might be used to satisfy the statutory concerns regarding conflict of interest and appearances of conflict. Based on our review of other agencies' policies, there appears to be no normative standard in the context of agency gift acceptance that precludes such alternative approaches. Indeed, we have discovered no other government agency whose policy is to prohibit entirely the acceptance of official agency gifts from regulated entities. And, as explained above, the existing government-wide standards regarding employee gift acceptance are intended to apply only in a context in which gifts are received personally by Federal employees; there is no comparable standard for official agency gift acceptance.

27. We also note that gifts to agencies do not necessarily involve the same type or degree of conflicts or appearance concerns as when personal gifts are made to employees with decisionmaking responsibility, the area in which most traditional conflict of interest regulation, such as the OGE standards of employee conduct, has focused. In addition, even when gifts are made to employees personally, exceptions exist that permit gifts from regulated entities and other persons affected by agency action. Interestingly, as discussed, one of the principal exceptions that applies to an individual employee's gift acceptance under the new OGE government-wide standards exists when gifts to employees also serve official agency interests, a context that is similar to the area of official gift acceptance. Other exceptions exist when government interests are found to supersede "appearance" concerns that otherwise might be raised by employees' personal and business relationships. See 5 C.F.R. § 2635.502(d). In short, even in the areas covered by existing conflict of interest regulation, "hard and fast" rules are not applied, especially when appearance concerns are balanced against competing governmental interests. For all of these reasons, therefore, we also seek comment on proposed

regulations that are more flexible than imposing an absolute bar on the Commission's receipt of gifts from regulated entities.

28. In considering alternative approaches, we have proposed below various regulatory mechanisms that fall into three general classes. First, we propose structural approaches and certain absolute prohibitions designed to avoid both conflicts of interest and appearance concerns. Second, we propose the imposition of mandatory factors that agency officials must consider in determining whether conflicts or appearances problems may exist. Finally, we propose to adopt public disclosure and reporting requirements that are intended to minimize or eliminate appearance problems. We would expect that aspects of all three of these approaches might be used in any final agency regulation.¹⁹

1. Structural rules and prohibitions.

29. An important tool in avoiding conflicts of interests and appearance issues may be to insulate agency officials with programmatic responsibilities, insofar as possible, from involvement in determinations regarding gift acceptance, as well as from discussions with potential donors regarding those gifts. By comparison, we note that the Department of Treasury policies, discussed above, require employees to refer any offers of gifts to specified agency officials. In a similar fashion, our regulations might require both potential donors and agency employees who receive gift overtures to refer all matters concerning gifts to specified agency officials such as the Commission's designated agency ethics official (DAEO), perhaps in consultation with ethics officials in the Office of the General Counsel, or to management officials who do not have regulatory or policy making responsibilities.

30. Further, as indicated in the HHS policies, we think that an agency's solicitation of gifts from entities whose interests are affected by an agency's programs raises the greatest potential for concern with regard to possible conflicts of interest. We therefore propose an absolute bar on agency solicitation of gifts from regulated entities and others identified as prohibited sources under the new OGE standards of conduct.²⁰ In addition, to ensure that there is no potential for abuse, we would prohibit the acceptance of cash gifts and require that all monetary gifts be made by check payable to the agency.

31. As reflected in the policies of other agencies, we also think that conflicts of interest and appearance problems may be greatest when gifts made to the agency appear to enure more to the personal benefit of employees. We therefore seek comment on whether certain types of gifts should be prohibited altogether. For example, we might preclude altogether the Commission's acceptance of food and drink when made under section 4(g)(3). Such gifts are commonly associated with Commission employees' attendance at conventions, meetings and other widely-attended events. In-

¹⁸ See 138 Cong. Rec. H11732 (daily ed. October 5, 1992) (remarks of Rep. Rinaldo) (FCC's gift authorization is intended to assist the Commission in meeting "its increasing regulatory responsibilities given current budget constraints . . .").

¹⁹ Where gifts are not offered by "prohibited sources," as defined in the OGE regulations governing employee conduct, we believe that no conflicts of interest concerns arise. Accordingly, some of the proposals discussed below may be inapplicable to such gifts, and a simplified procedure may be adopted.

²⁰ Like HHS, however, when a regulated entity has expressed an unsolicited interest in supporting an agency's activities, we would permit agency officials to refer the potential donor to the appropriate official responsible for gift acceptance. We propose that that official may advise the donor of the availability of a gift fund, the types of equipment, property, or services that may be of use to the Commission, and the procedures for effectuating gifts.

stead, acceptance of these types of gifts would continue to be governed by the government-wide standards of employee conduct, which provide for the acceptance of such gifts, or pursuant to other independent authority. As a general matter, we also propose not to accept gifts of travel expenses for attendance at meetings sponsored or co-sponsored by a non-government source under section 4(g)(3) and request comment on this proposal. Rather, employee travel expenses for such meetings would continue to be accepted pursuant to other statutory provisions, such as the provisions of the Government Employees Training Act, 5 U.S.C. § 4111, which permits individual employees to accept travel, subsistence and other expenses, when offered by organizations that are tax exempt under 26 U.S.C. § 501(c)(3). Gifts of travel expenses for such meetings could also be accepted pursuant to the provisions of section 4(g)(2) of the Communications Act.²¹

2. Mandatory Factors in Evaluating Conflicts of Interest.

32. Where gifts are offered by regulated entities and similar sources, we would require that the agency official with authority to accept the gift undertake a careful analysis to determine whether the gift's acceptance reflects unfavorably on the Commission's ability to carry out its responsibilities in a fair and impartial manner. As indicated above, we believe such concerns are accentuated when the gift in question enures to the benefit of the employee personally and not just to the agency. As proposed above, many types of gifts that appear primarily intended to benefit employees personally would not be accepted under section 4(g)(3). However, the possibility nevertheless remains that some gifts offered pursuant to section 4(g)(3) might also provide tangible benefits to employees.

33. We would therefore require that officials making conflicts of interests determinations evaluate at the outset the extent to which benefits of the gift might accrue to individual employees. For example, gifts of free training or attendance at conferences that are offered within the local Washington area, and, hence, which are covered neither by section 4(g)(2) of the Communications Act, nor the new government regulations implementing 31 U.S.C. § 1353, might fall within this category.²² If the gift does benefit an individual employee, agency officials should go on to consider whether that employee is responsible for matters affecting the potential donor that are currently pending before the agency, and the significance of the employee's

role in any such matter. Furthermore, where the gift involves local conference attendance or free training, factors to be considered might be analogous to those identified under new GSA regulations governing acceptance of travel and related fees, that implement section 1353. GSA, considers for example, a number of factors to determine whether the circumstances make it appear that it is the donor's intent to influence the employee or agency in future actions or to reward the employee for prior actions. *See 57 Fed. Reg. 53287*, and examples therein; 41 C.F.R. § 304-1.5.

34. Whether or not the proposed gift benefits employees personally, a variety of other factors should also be considered. The agency official making a conflicts determination should consider the nature and sensitivity of any matters pending at the Commission affecting the regulated source and the timing of the gift. For example, sensitivity may be heightened if a matter affecting the donor is currently pending on the Commission's Sunshine agenda at the time the gift is offered (or at the time the gift would be accepted).²³ Other factors would include the value of the gift and the frequency of gifts made by a particular donor. Commenters may also want to address whether it might be advisable to impose limitations on the value and frequency of gifts accepted from individual donors.

35. Finally, the Commission official making a conflict of interest determination must consider the specific reason that the donor provides concerning the reason underlying the gift. For example, if the donor's reason for the gift is that the donor expects to benefit from increased efficiency at the Commission, a benefit that presumably accrues to all regulatees impartially, or because the donor wants to take advantage of related tax benefits, any "appearance" concerns associated within the gift are likely to be diminished. For purposes of considering this factor, we propose that donors be required to supply a written statement specifying the reason for the gift, and how the donor expects to benefit. Donors would also be required to sign a verification that the gift is unconditional and is not contingent on any promise or expectation that the agency's receipt of the gift will benefit the donor in any regulatory matter. As explained below, such statements and verifications would be made available for public inspection.

²¹ We note, however, that section 4(g)(2) is only intended to address travel reimbursement for meetings that are "non-government sponsored functions." *See H.R. Rep. No. 765*, 97th Cong., 2d Sess. 26 (1982). In light of that, acceptance of travel reimbursement related to some types of events might be authorized by section 4(g)(3) rather than by section 4(g)(2). A similar approach is reflected in GSA regulations implementing section 1353, which governs other Federal agencies' travel reimbursement for attendance at "meetings." *See note 14, supra*. These regulations provide that section 1353 authority has no application to government-sponsored events or events required to carry out an agency's statutory and regulatory functions. *See 41 C.F.R. § 304-1.2(3)*. Nevertheless, the GSA rules also make clear that section 1353 does not preclude the agency's use of its own gift acceptance statute to accept travel reimbursement for attendance at, or participation in, government-sponsored meetings or events required to carry out an agency's statutory or regulatory functions. *See 41 C.F.R. § 304-1.8(a)(3); 57 Fed. Reg.*

53285 (Nov. 9, 1992). Following this approach by analogy, it appears that the Commission's acceptance of travel reimbursement for some types of events, such as meetings with foreign correspondents to carry out international coordination activities provided for by treaty, might be accepted under the general authority of section 4(g)(3). We request comment on this view.

²² *See 47 U.S.C. § 154(g)(2)*, which, through cross reference to 47 U.S.C. § 4(g)(1), covers travel and related expenses "other than in the city of Washington." GSA regulations implementing section 1353 do not apply to employees other than those in travel status. *See 41 C.F.R. § 304-1.2(a); 57 Fed. Reg. 53285*.

²³ We would not propose, however, to reject a gift on conflicts or appearances grounds merely because the donor has matters pending at the agency. As a practical matter, Commission regulatees frequently have a variety of applications and other requests pending before us, many of which are routine in nature.

3. Public Disclosure and Reporting Requirements

36. Some gift and bequest statutes expressly impose a reporting requirement on the department or agency. For example, the Department of the Treasury's statute directs that the Secretary "shall, not less frequently than annually, make a public disclosure of the amount (and sources) of the gifts and bequests received under this subsection and the purposes for which amounts in the separate fund established under this subsection are expended." 31 U.S.C. § 321(d). Treasury's statute thus directs them to make information regarding gifts publicly available, not to file it with any specific authority, e.g., Congress. Treasury fulfills this obligation simply by placing a copy of their trust fund report in their library.

37. Section 4(g)(3) imposes no reporting requirement upon the Commission. However, given that our statutory gift acceptance authority is coupled with explicit conflict of interest limitations, we propose to keep a detailed record of all gifts. As with all public trust funds, we may be called upon, at any time, to report about our gift fund to Congress or the General Accounting Office (GAO).²⁴

38. Further, to avoid "appearances" problems and to enable the fullest public scrutiny of Commission actions in accepting gifts, we propose to make publicly available relevant information concerning any gifts that are accepted. Such information would include the identity of the source, a description of the gift, the gift's value, documentation concerning the donor's reason for the gift and a verification that the gift is unconditional. We would maintain this information in a designated location that is fully accessible to the public. We also seek comment on whether such information should be published annually in the Federal Register. We note that, for gifts below a certain dollar threshold, it may not be cost-effective to incur Federal Register publication expenses. Records might also be included in the Commission's Annual Report to Congress. In addition, we seek comment on whether we should afford a specified period of public notice before accepting gifts from prohibited sources that have a high monetary value.

V. CONCLUSION

39. As discussed above, we have developed several regulatory approaches that appear to satisfy the new provision in the Communications Act directing us to issue implementing regulations that preclude real and apparent conflicts of interest when implementing our gift acceptance authority. To assist us in our efforts, we invite public comment on these proposals. Although section 4(g)(3) contains no reporting requirement, we also propose to establish this type of requirement as part of our internal policies and procedures. Finally, commenters are invited to suggest other rules that would enable us to fulfill the congressional mandate.

VI. PROCEDURAL MATTERS

40. Pursuant to the applicable procedures set forth in section 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **August 24, 1993** and reply comments on or before **October 23, 1993**. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must submit an original and four copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, (Room 239), of the Federal Communications Commission.

41. This *Notice of Proposed Rulemaking* is a non-restricted notice and comment proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

42. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities as defined by section 601(3) of the Regulatory Flexibility Act. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the certification, to the chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601, *et seq.* (1981).

43. Authority to conduct this inquiry is given in sections 4(g)(3), 4(i), 4(j), 303(r) and 403 of the Communications Act, 5 U.S.C. § 154(g)(3), (i), (j), 303(r), and 403.

44. Further information on this proceeding may be obtained by contacting Sharon B. Kelley, Office of the General Counsel, 202/632-6990.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Donna R. Searcy *w/FCP*
Secretary

²⁴ Just this situation occurred with a number of departments in 1980, when GAO conducted a study of agency gift funds. A 1980 GAO Report stated that during fiscal year 1979, forty-one

government agencies received a total of \$21.6 million classified as gift revenues. See Review of Federal Agencies Gift Funds, FGMSD-80-77 (September 24, 1980).